IBRAHIM MUSA

v.

BAHARI NAYAN

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 191 OF 1984]
26 MAY 1990

CONTRACT: *Application for order of specific performance - Sale and Purchase of shares in 3 pieces of land - No transfer of properties - Allegation of fraudulent misrepresentation - Intention to defraud lawful beneficiaries of defendant - Whether allegation of a speculative nature - Evidence - Non Est factum - Undue influence - Burden of proof on defendant - Limitation - Effect of in cases for recovery of land - Duty of defendants as administrator - Whether defendants are bare trustees - Section 16 of the Contracts Act 1950.*

The plaintiff in this action contends that he entered into a sale and purchase agreement with one Tok Chin (the deceased), wherein Tok Chin agreed to sell his shares in 3 pieces of land to the plaintiff for RM3,000. There was no transfer of these properties before Tok Chin died. The plaintiff further contended that Tok Chin was, and the defendant as administrator of the estate of Tok Chin, is the bare trustee of the said shares in the said piece of land and sought an order that the defendant specifically perform the agreement.

It was the defendant's contention that the plaintiff by way of fraudulent misrepresentation caused Tok Chin to thumbprint the agreement and that it was carried out to defraud the lawful beneficiaries of the deceased.

Held:

[1] On the evidence before the Court, the defendant was speculating that there was fraud and undue influence.

[2] The defendant has not, as required when fraud is alleged, discharged the onus of proof beyond reasonable doubt - see *Saminathan v. Pappa* [1981] 1 MLJ 121.

[3] For purposes of limitation in actions like this one which involve the recovery of land, time runs from the date of infringement or at least a clear and unequivocal threat to infringe that right. Service of the writ on the defendant constitutes the plaintiff's intention to stand on his legal right under the agreement and there was no threat to infringe that right until the defence was filed. Therefore, the plea of limitation must fail.

[4] The deceased was and the defendant, as administrator of the deceased estate is a bare trustee of the said shares in the said 3 pieces of land for the plaintiff and the defendant is bound to convey the same to the plaintiff.

[5] The defendant as administrator of the estate of the deceased is to specifically perform the agreement dated 19 September 1956 by executing a legal and valid registrable transfer of the said shares in the said process of land to the plaintiff.

[Order accordingly.]

Cases referred to:
Saminathan v. Pappa [1981] 1 MLJ 121
Poosathurai v. Kannappa Chettiar & Ors. [1919] 471A1
Nazri v. Mesah [1971] 1 MLJ 32
Ahmad bin Hussain v. Hajjah Mek [1973] 1 MLJ 28
Tool Metal Co. v. Tungsten Electric Co. [1955] 2 All ER 657
Ragunath Prasad v. Sarju Prasad [1924] AIR PC 60

For the plaintiff - E. Mayandi; M/s. Mayandi & Panjaram
For the defendant - Manjit Singh; M/s. Manjit Singh & Co.

JUDGMENT

KC Vohrah J:

One Chin @ Husin bin Derambang (Tok Chin) died on 28 January 1957 and the defendant is the administrator of his estate. According to the plaintiff on 19 September 1956 at Jitra he and Tok Chin entered into a sale and purchase agreement where Tok Chin sold his shares in 3 pieces of land to the plaintiff for RM3,000. PW2 gave evidence that he witnessed the agreement being executed by Tok Chin and the plaintiff on 19 September 1956 in Jitra and that he had it duly stamped. The document was produced in Court and identified by both the plaintiff and PW2.

There was no transfer of these properties before Tok Chin died. And the plaintiff avers that Tok Chin was and the defendant as administrator of the estate of Tok Chin is the bare trustee of the said shares in the said pieces of land and prays for an order that the defendant to specifically perform the agreement dated 19 January 1956.

The defendant in one of his pleas avers that the plaintiff by way of fraudulent misrepresentation caused Tok Chin to thumbprint the agreement. The particulars of the fraud pleaded were that the plaintiff "realising he will not get any shares from the estate of the deceased as his father predeceased the said deceased fraudulently obtained the thumbprint of the said deceased who was not in a position to understand the nature and effect of the said document with intent to defraud the lawful beneficiaries of the deceased."

While it is not disputed that the plaintiff's father predeceased Tok Chin and therefore the plaintiff is not entitled to a share in Tok Chin's estate according to Muslim law since Tok Chin had no children there was not a shred of evidence to show that the thumbprint in the agreement was obtained by fraud. There was an attempt to show that it was not possible for the plaintiff to have paid RM3,000 to the plaintiff in 1956 as he was a fisherman having meagre earnings. But the attack was of a speculative nature and did not take into account the fact that he also earned money through farming, that the cost of living then was different from today's cost of living and of his ability to save.

The quality of the evidence of the defendant and his two witnesses left much to be desired. With his confused evidence as regards the period he was in Jerlun when Tok Chin was supposedly ill - being inconsistant about the dates he was there and being inconsistant about his being there on leave from the British Army for so long, his going to Hong Kong in 1956 and yet being in Jerlun the whole of 1956, his coming to Jerlun in order to visit Tok Chin, then shifting ground - that he came because he was sick - the question arose as to whether he was at all in Jerlun in 1956 when Tok Chin was supposedly ill. His witness DW3 was clear that the defendant was not in Jerlun during 1956 as he said the defendant was still young and immature. That could not have been accurate as from a calculation based on the defendant's present age, in 1956 he was 35 years old. But what is important about DW3's

evidence was that the defendant's house was not in Jerlun but in Kuala Sanglang 6 and 7 miles away and there were no roads in between but forests. I have thus great difficulty in accepting the defendant's evidence that he stayed in a house about 100 feet from Tok Chin's house and had seen him to be senile and unable to walk. My view is he was not there and his answers when he cross-examined show he was speculating that there was fraud and undue influence. It was put to him that in September 1956 Tok Chin went to Jitra in the company of one Haji Abdullah, the plaintiff (PW1) and PW2 and his answer was, "Not correct because I do not know". It was then put to him that when the deceased went to Jitra he was healthy and he was in full control of his mental faculties and his reply was, "I disagree because I do not know. Had I known I would have agreed". His Counsel tried to save a bad situation on this last question and answer by asking what he meant by his answer and he said, "I do not know what he did so I did not know".

Neither DW2, brother of the defendant, nor DW3 gave evidence relating to the alleged fraud. The defendant has not, as required, when fraud is alleged (see *Saminathan v. Pappa* [1981] 1 MLJ 121), discharged the onus of proof beyond reasonable doubt and this plea must fail.

As regards **undue influence** the defendant particularised the details thus - "(1) The deceased being illiterate and a feeble man aged 97 years was subject to the influence of the plaintiff; (2) The said agreement having been entered into by the said deceased as a result of the undue influence exerted by being in a position of confidence and trust.

That Tok Chin was about 97 years at the time the contract was signed is not disputed. But the defence evidence of his being sick, his being bedridden, his being senile is hardly clear and unequivocal. I do not think it is safe to rely on the evidence of the defendant as, as was pointed earlier, his evidence was unreliable and in fact the inference to be drawn from the answers he gave under cross-examination and which I highlighted earlier was that he did not know about Tok Chin's health and mental state at the time he signed the agreement. As for the evidence of DW2 and DW3 they were vague about Tok Chin's illness; it is not possible to tell whether Tok Chin could walk around or was bedridden or whether he became sick after September 1956 for 3 months (he executed the agreement on 19 September 1956) or was sick in September 1956. There is agreement that Tok Chin was ill for 3 months before he died. The plaintiff's evidence was that Tok Chin was sick for 3 months. Tok Chin died on 28 January 1957. And that would mean that Tok Chin became ill beginning late September or early October 1956 and that he was not ill on 19 September 1956.

The evidence of Tok Chin being under the influence of the plaintiff was far from clear. The plaintiff was his nephew and lived near him but not with him as the defendant tried to make out (and incidentally Tok Chin was not a bachelor as pleaded but had a wife), the plaintiff and his wife did provide food for Tok Chin and his wife but I cannot see from this relationship the plaintiff's dominance over Tok Chin.

But even assuming in the context of s. 16 of the Contracts Act 1950 the plaintiff was in a position to dominate the will of Tok Chin it must be shown that the plaintiff used that position to obtain an unfair advantage over Tok Chin (See *Poosathurai v. Kannappa Chettiar & Ors.* [1919] 471A1; *Ragunath Prasad v. Sarju Prasad* [1924] AIR PC 60). But what was unfair? There was no gift by Tok Chin to the plaintiff of Tok Chin's shares in the 3 pieces of land. There was a sale of those shares and the price was RM3,000 and no evidence was adduced to show that the RM3,000 was an under valuation of the shares in the said pieces of land. I fail to see undue influence.

As for the third plea which the defendant relies on - that of limitation - that does not arise. There has been no evidence adduced that time started to run earlier than the date the defence was filed in this suit, a suit to obtain specific performance of the agreement, essentially an action to recover land. For purposes of limitation in actions like this one, essentially for recovery of land, time runs from the date of infringement or at least a clear and unequivocal threat to infringe that right (see *Nazri v. Mesah* [1971] 1 MLJ 32; *Ahmad bin Hussain v. Hajjah Mek* [1973] 1 MLJ 28). Service of the writ on the defendant constituted plaintiff's intention to stand on his legal right under the agreement (*Nazri v. Mesah*, *ibid* and *Tool Metal Co. v. Tungsten Electric Co.* [1955] 2 All ER 657) and there was no threat to infringe that right until the defence was filed. The plea of limitation must fail.

In the result the plaintiff succeeds in his action. The Court declares that Chin @ Husin bin Derambang, deceased, was, and that the administrator of his estate, the defendant, is a bare trustee of the said shares in the said 3 pieces of land for the plaintiff and that the defendant is bound to convey the same to him. The defendant as administrator of the estate of the deceased shall specifically perform the agreement dated 19 September 1956 by executing a legal and valid and registrable transfer of the said shares in the said pieces of land to the plaintiff failing which the Senior Assistant Registrar is empowered to execute the transfer on behalf of the defendant. Costs to the plaintiff.

Also found at [1990] 2 CLJ 223